No. 95-1872

In The

Supreme Court of the United States

October Term, 1995

THE HONORABLE WILLIAM STRATE, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation; THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly analyzed the issue of tribal civil jurisdiction under the rule of *Montana v. United States*, 450 U.S. 544 (1981), in refusing to allow tribal court jurisdiction over a tort action between two non-Indians arising on a North Dakota state highway within the geographical confines of the Fort Berthold Indian Reservation.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the *en banc* judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on February 16, 1996.

STATEMENT OF THE CASE

This is a personal injury action that was brought in the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation in North Dakota (hereinafter "Tribal Court").[1] The action arises out of a traffic accident that occurred between two non-Indians on a state highway within the exterior boundaries of the Fort Berthold Indian Reservation (hereinafter "Reservation").

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[1] Petitioners' Statement of the Case contains numerous factual statements which are not a part of the record developed by any of the courts. While not particularly relevant, these assertions should not be treated as fact. The original motion to dismiss in Tribal Court was based on the jurisdictional questions only. No finding of fact or factual record was prepared at any time. In particular, portions of the information asserted in Footnote 1 and all of the assertions in Footnotes 3 and 5 of the Petition have absolutely no basis in the record. Furthermore, Petitioners' Petition also asserts as fact various assertions which, pursuant to Rule 15(2) of the Rules of the Supreme Court of the United States, will be clarified elsewhere in this brief, where necessary.

On November 9, 1990, Lyle Stockert (hereinafter "Stockert") was driving a gravel truck owned by A-1 Contractors (hereinafter "A-1"). He was traveling in the northbound lane on North Dakota Highway No. 8, near Twin Buttes, North Dakota, which is in the exterior boundaries of the Reservation. Gisela Fredericks was traveling south and abruptly started to make a left turn in front of Stockert in his northbound lane. Stockert tried to avoid a collision with Fredericks by braking and turning his truck toward the right-hand ditch. Gisela Fredericks was injured when her vehicle struck the rear driver's side of the truck. Even though neither she nor Stockert are Indians, Mrs. Fredericks initiated an action against Stockert and A-1 in Tribal Court[2] seeking in excess of 13 million dollars.[3]

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[2] There is no question that the State of North Dakota would have jurisdiction over this tort lawsuit and is the proper forum. (Appendix of Petitioners' Petition at 82) (hereinafter App.). The Fredericks filing of this suit in Tribal Court is an apparent attempt to overcome difficult facts by taking advantage of family and personal connections with enrolled members of the reservation by having the case tried in a jurisdiction where Lyle Stockert and his peers are outsiders, precluded by rule from even sitting on the jury panel. Code of Laws, Three Affiliated Tribes, Fort Berthold Reservation, Code of Civil Procedure § 8(c). This raises potential equal protection and due process questions under 25 U.S.C. § 1302(8), which would be raised if the matter was allowed to proceed in Tribal Court.

[3] The Petitioners' Petition for a Writ of Certiorari suggests that Mrs. Fredericks sought $1,000,000 for her personal injuries and her children sought $1,000,000 for loss of consortium. (Petitioners' Petition for a Writ of Certiorari at 5) (hereinafter Petition). However, they also sought recovery of in excess of $10,000,000 in punitive damages. (App. at 52).

The proceedings in the Tribal Court, Tribal Appellate Court, Federal District Court, Eighth Circuit Court of Appeals three judge panel and the decision of the *en banc* Court are appropriately outlined in Petitioners' Petition.

The relevant facts of this case are quite simple. Stockert is non-Indian and resides off the reservation; A-1 is a non-Indian owned business with its principal place of business off the Reservation. Gisela Fredericks is also non-Indian.[4] She was married to an Indian who is now deceased. Their adult children are enrolled members of the Tribe. Thus, none of the relevant parties[5] are enrolled members of the tribe, and all are citizens of the State of North Dakota.

The specific question addressed and answered by the Eighth Circuit Court of Appeals *en banc* was whether an

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[4] Although Petitioners assert as fact that Gisela Fredericks was a Reservation resident for 40 years (Petition at 4) a factual dispute was never resolved as to whether or not Gisela Fredericks resided on the Reservation at the time of the accident. The federal district court, while noting the factual dispute, found that the question "is irrelevant to the issue of whether the tribe retains jurisdiction over a dispute between two non-Indians." (App. at 77). The motion for dismissal in the Tribal Court was based only on the pleadings and no finding of fact or factual record was made at any time in the proceedings below.

[5] The fact that Gisela Fredericks sons, who are allegedly Indians, are named plaintiffs, does not confer civil jurisdiction with the tribal court. The sons' consortium claims are not recognized causes of actions and are derivative rather than independent causes of action. The tribal court refused to express an opinion on whether there was jurisdiction over these claims. (Petition at 6 n.6) This issue is not before this Court nor relevant to its determination.

American Indian Tribal Court has subject matter jurisdiction over a tort case which arose out of an automobile accident which occurred between two non-Indian parties on an Indian reservation.

REASONS THE WRIT SHOULD BE DENIED

1. THIS CASE DOES NOT PRESENT UNRESOLVED QUESTIONS OF FEDERAL LAW CONCERNING THE EXISTENCE OF TRIBAL COURT JURISDICTION OVER A CIVIL ACTION BETWEEN TWO NON-INDIANS THAT AROSE WITHIN THE EXTERIOR BOUNDARIES OF AN INDIAN RESERVATION

A. *Montana* clearly limits tribal power over non-Indians

The Petitioners mistakenly assert that this Court's cases set forth different and conflicting rules for determining whether an Indian Tribe has civil jurisdiction over the activities of non-Indians within the boundaries of an Indian reservation. However, as the Eighth Circuit opinion so eloquently pointed out, that is simply not the case.

In *Montana v. United States*, 450 U.S. 544 (1981), this Court held, without qualification, that the *"exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."* *Montana*, 450 U.S. at 564 (citations omitted) (emphasis added). The *Montana* Court then outlined two sets of circumstances wherein a tribe may exercise some power over non-Indians. First,

the Court noted that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565 (citations omitted). Secondly, the Court held that a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citations omitted).

Indeed, this Court has reiterated repeatedly that the sovereignty of the Indian tribes is of a unique and limited nature. *Duro v. Reina*, 495 U.S. 676, 685 (1990) (*citing United States v. Wheeler*, 435 U.S. 313, 323 (1978), *overruled by statute on other grounds*, 25 U.S.C. § 1301(2) & (3)).

Moreover, as the *en banc* decision notes this Court has reiterated or reaffirmed the *Montana* analysis of civil jurisdiction over non-Indians a number of times. (App. at 9-10) (*citing South Dakota v. Bourland*, 113 S. Ct. 2309, 2319 (1993); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 267 (1992); *Duro*, 495 U.S. at 687-88, *overruled by statute on other grounds*, 25 U.S.C. § 1301(2)&(3); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality)).

This Court's most emphatic reiteration of the concept of general divestiture outlined in *Montana* appears in its recent statement that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation', and is therefore *not* inherent."

Bourland, 508 U.S. 679, 695 n.15 (*quoting, in part, Montana*, 450 U.S. at 564) (emphasis in original).

B. *Iowa Mutual*, when read properly, is consistent with *Montana*

In the face of this clear rule of general divestment of tribal civil jurisdiction absent express congressional authorization the Petitioners assert that this analysis conflicts with the *Iowa Mutual*[6] "rule."[7] The specific holding or "rule" in *Iowa Mutual* is that exhaustion of tribal remedies is required before a federal district court can decide the issue of federal court jurisdiction.[8] *Iowa Mutual*, 480 U.S. at 18-19.[9] In addressing the exhaustion question, the Court made the following observation:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) [other citations omitted]. *Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.*

[6] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

[7] The Petitioners, after citing the *Iowa Mutual* case indicate that all future references to the case in their Petition will be to "the *Iowa Mutual* rule." (Petition at 8). Although, Petitioners' attempt to portray some isolated language from *Iowa Mutual* as a "rule" their erroneous characterization does not make it so.

[8] The *Iowa Mutual* rule of exhaustion of tribal remedies was followed by respondents in first bringing the issue of tribal court jurisdiction to the tribal court and exhausting the tribal appeal process before bringing the matter to federal district court.

[9] *See also Brendale*, 492 U.S. at 427 n.10 (wherein the plurality specifically noted that *Iowa Mutual* only established an exhaustion rule and did not determine whether the tribe had jurisdiction over nonmembers).

Iowa Mutual, 480 U.S. at 18 (emphasis added).

The Petitioners put too much emphasis upon this language and effectively nullify and contradict *Montana* in arguing that Indian tribes retain unfettered geographic and territorial civil jurisdiction unless that jurisdiction has been expressly limited by federal statute or treaty.

Thus, the Petitioners, by elevating this dicta in *Iowa Mutual* to a "rule" of presumptive jurisdiction absent express congressional divestment, essentially throw out the *Montana* baby with the bathwater. However, their argument is misguided for several reasons.

First and foremost, it must be emphasized that *Iowa Mutual* was simply an exhaustion case. It did not decide nor determine the broader question of civil jurisdiction. *See Brendale*, 492 U.S. at 427 n.10. As such, Petitioners assertion that there is even an "*Iowa Mutual* rule" of presumptive tribal civil jurisdiction absent express congressional divestment is wrong. The *Iowa Mutual* case did not create such a rule either expressly or impliedly. As such, there is no conflict with *Montana* as Petitioners assert.

More importantly, as the *en banc* decision correctly points out, the language in *Iowa Mutual*, which the Petitioners rely on, "can and should be read more narrowly and in harmony with the principles set forth in *Montana*,

which the Court cites in making those observations." (App. at 11).

In explaining how *Iowa Mutual* should be read in harmony with *Montana* the Court of Appeals noted:

> When the Court observes in *Iowa Mutual* that "[t]ribal authority over the *activities* of non-Indians on reservation lands is an important part of tribal sovereignty," 480 U.S. at 18, the Court cites *Montana* and thus is referring to the types of activities, like consensual contractual relationships (the first *Montana* exception), that give rise to tribal authority over non-Indians under *Montana*. Likewise, when the Court goes on to say "[c]ivil jurisdiction over *such activities* presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," *id.* (emphasis added), the Court again is referring to a tribe's civil jurisdiction over tribal-based activities that exists under *Montana*. . . . Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* described as giving rise to tribal jurisdiction over non-Indians or nonmembers. Instead, we read it within the parameters of *Montana*.

(App. at 12).

Iowa Mutual can and should be read only within the parameters of its recognition of the limitations on tribal court jurisdiction over non-Indians outlined so clearly in *Montana*. As the Eighth Circuit noted, a careful reading of the *Montana* and *Iowa Mutual* cases indicate that they can and should be read together to establish one comprehensive and integrated rule:

> a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

(App. at 18).

This comprehensive and integrated rule demonstrates that there is no unresolved question of federal law and, as such, the writ should be denied.

2. THE COURT OF APPEALS' *EN BANC* OPINION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS INTERPRETING THE EXISTENCE OF INHERENT TRIBAL SOVEREIGNTY OVER THE ACTIONS OF NON-INDIANS ON INDIAN LAND WITHIN TRIBAL RESERVATIONS

The Petitioners incorrectly assert that the *en banc* opinion is in conflict with *Iowa Mutual* and *National Farmers Union*[10] because those cases allegedly established[11] a presumption of tribal civil jurisdiction absent specific divestiture by treaty or federal statute. Arguing from this incorrect reading of those two cases, they then

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[10] *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

[11] As pointed out above these cases did not establish a rule of presumptive tribal civil jurisdiction absent express divestment, but were limited to the issue of requiring exhaustion of tribal court remedies prior to seeking review in federal court.

assert that the holdings of *Montana*, *Brendale*, and *Bourland* are strictly limited to disputes relating to a tribe's ability to exercise authority over non-Indians' activities on non-Indian fee lands[12] or disputes addressing tribal regulatory power over non-Indians as opposed to tribal adjudicatory power over non-Indians. Petitioners then conclude, the *en banc* opinion conflicts with the holdings of *Iowa Mutual* and *National Farmers Union* by applying the *Montana* analytical framework to a dispute involving non-fee lands and a question of adjudicatory power. In fact, there is absolutely no error in the *en banc* application of *Montana* to this dispute. Only a misreading of *Iowa Mutual* could lead Petitioners to such a conclusion.

While both *Montana* and *Brendale* involve questions of tribal authority over non-Indians on non-Indian owned fee lands, neither case in any way limits its discussion, rationale or holding to issues arising on fee lands. Instead, *Montana* specifically found, without qualification or caveat, that *tribal power* itself is limited to what is necessary to protect tribal self government and to control internal relations, absent express congressional delegation of more expansive authority. *Montana*, 450 U.S. at 564. Furthermore, *Montana* specifically addressed the "forms of civil jurisdiction over non-Indians *on their reservations*" and outlined the two limited situations wherein that jurisdiction may apply. *Id.* at 565 (emphasis added). The Court did not limit its rationale to cases arising on

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[12] Fee lands are plots of land located within the exterior boundaries of the reservation but which are owned by individuals in fee simple.

non-Indian fee lands but was referring broadly to tribal power over non-members.

Moreover, as the Court of Appeals aptly notes in the *en banc* decision "a number of cases analyzing civil jurisdictional issues in non-fee land disputes have relied upon or cited *Montana*." (App. at 16) (*citing Stock West Corp. v. Taylor*, 964 F.2d 912, 918-19 (9th Cir. 1992) (en banc); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990); *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993). The *en banc* decision correctly notes that "any attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both uncompelling and unsupported by the language of those two cases." (App. at 16).

In addition, the Petitioners attempt to limit *Montana* and its progeny to cases involving regulatory power versus adjudicatory power is without any basis in any of the cases. In fact, "those cases have spoken about civil jurisdiction in broad and unqualified terms without any limitation of the discussion to particular aspects of civil jurisdiction." (App. at 17). Moreover, in *Iowa Mutual*, the Court cites *Montana* without any indication that *Montana* should be limited to factual situations regarding regulatory jurisdiction.[13] (App. at 17) (*citing Iowa Mutual*, 480 U.S. at 18).

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[13] The *en banc* opinion aptly indicates that Petitioners' attempt to apply such a distinction is, in this case, illusory since if the tribal court tried this suit it would essentially be acting in both an adjudicatory and regulatory capacity. (App. at 17).

The Petitioners attempt to suggest that a conflict exists between the *en banc* opinion and this Court's previous rulings based on the argument that the *Montana* analytical framework only applies to fee land disputes or disputes relating to regulatory functions is misplaced. It certainly does not support a basis for this Court's granting the writ.

3. THE COURT OF APPEALS' EN BANC OPINION DOES NOT CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Petitioners assert that the *en banc* opinion of the Eighth Circuit Court of Appeals below is contrary to the Ninth Circuit Court of Appeals decision of *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), *cert denied*, 115 S. Ct. 485 (1994). However, there are important factual and other distinctions which clearly distinguish *Hinshaw* from this case.

In *Hinshaw*, Christian Mahler was killed when the motorcycle he was driving was struck by a car being driven by Lynette Hinshaw. Christian Mahler was not an enrolled member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation although he did reside on the reservation with his parents, Gloria and Kenneth Mahler. Lynette Hinshaw was not an enrolled member of the Tribes but she also resided on the reservation. Gloria Mahler, Christian's mother, was an enrolled member of the Tribes.

Gloria and Kenneth Mahler filed an action for damages against Hinshaw in the tribal court. Hinshaw

appeared specially to contest jurisdiction. "The Tribal Court denied her motion to dismiss, and found jurisdiction because the accident occurred on the reservation *and Gloria Mahler was an enrolled member of the Tribes.*"[14] *Hinshaw*, 42 F.3d at 1180 (emphasis added). Hinshaw appealed to the Tribal Appellate Court, which affirmed the tribal court's decision.

The Ninth Circuit addressed the jurisdiction of the tribal court over the action. The court specifically noted that *Hinshaw's actions injured Gloria Mahler, a tribal member. Hinshaw*, 43 F.3d at 1180.

As such, it was Gloria Mahler's status as an enrolled member of the Tribes which the Ninth Circuit relied upon in finding the existence of tribal jurisdiction. The court also emphasized that *all* parties resided on the reservation. As such, *Hinshaw* is not in conflict with the *en banc* decision of the Eighth Circuit.[15] Therefore, there is no conflict among the Circuits and the Petition should be denied.

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[14] It is evident that the tribal court itself relied heavily on the fact that Gloria Mahler was an enrolled member of the Tribes. This in itself distinguishes *Hinshaw* from the present case.

[15] Contrary to the *Hinshaw* opinion, in this case the Petitioners have never claimed that the tribal court has exclusive jurisdiction over this action. Instead, they appear to acknowledge that the North Dakota state courts have at least concurrent jurisdiction. (Petition at 6 n.7).

4. THE COURT OF APPEALS CORRECTLY APPLIED THE TWO PART *MONTANA* TRIBAL INTEREST TEST

The *Montana* tribal interest test sets forth the two instances wherein the tribes may retain civil jurisdiction over non-Indians. These include the "consensual relationship" test and the "direct effect" test.

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66 (citations omitted).

A. The "Consensual Relationship" exception does not apply

The Petitioners argue that the consensual relationship test is satisfied in this case because A-1 entered into a landscaping subcontract with LCM, a subsidiary of the Tribe, to perform work on a tribal community building.

They argue Stockert was on the reservation in furtherance of that subcontract when the accident occurred.[16]

The Court of Appeals rejected that argument. The *en banc* decision notes this is a simple personal injury lawsuit initiated by a non-Indian against another non-Indian arising out of a vehicular accident which happened to occur within the geographical confines of the reservation. The personal injury action was brought by a non-Indian, Gisela Fredericks, not the Three Affiliated Tribes. The tribe was not a party to the personal injury action and any consensual relationship between the Respondents and the tribe is not the subject of this case. As such, the *Montana* consensual relationship test is not satisfied.

Put quite simply, the dispute in this case arises from a simple automobile accident between two non-Indians and does not arise under the terms of, out of, or within the ambit of the "consensual relationship" which may have existed with the tribe. To suggest, as the Petitioners do, that this meets the *Montana* "consensual relationship" test is an unsupported, unwarranted, and, indeed, unwanted, result. If the tribes could obtain unlimited civil jurisdiction, relating to any matter or dispute, over a party who entered into a commercial relationship with the tribe then third parties' willingness to enter into any

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[16] As Judge Hansen points out "[t]here is no proof (as opposed to allegations) that we can find in the record to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident." (App. at 3 n.1). The LCM contract, though never formally made a part of the record, provides for adjudication of disputes between A1 and LCM under Utah law in Utah courts. (App. at 21 n.5).

commercial arrangements with a tribe will be significantly curtailed. Clearly, LCM and A-1 sought to avoid such a problem by agreeing to abide by Utah law.

B. The "direct effect" exception does not apply

The Petitioners also argue that the "direct effect" test, as outlined in *Montana*, is satisfied in this case. *Montana* indicates that a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on the reservation when that conduct has some *direct effect* on the tribes' political integrity, economic security, or health and welfare.

In this case, the Petitioners argue that the tribes' interest in asserting its sovereign authority over events that occurred within the geographical boundaries of the reservation is, in and of itself, sufficient to meet the direct effect test outlined in *Montana*. However, such a broad ruling would completely ignore the previous dictates of this Court.

In *Duro*, the Court stated that while a "basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory . . . the tribes can no longer be described as sovereigns in this sense." *Duro*, 495 U.S. at 685. Indeed, such an application of the direct effect test would also conflict with this Court's decision in *Bourland*. In *Bourland*, the Court noted that "the reality [is] that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' and is therefore *not*

inherent." *Bourland*, 508 U.S. at 695 n.15 (citation omitted) (emphasis in original).

As the *en banc* decision notes "this desire to assert and protect excessively claimed sovereignty is not a satisfactory tribal interest within the meaning of the second *Montana* exception." (App. at 22). Any other result would render meaningless this Court's previous rulings including *Montana*, *Duro*, a[illegible]*rland*. As noted in the Court of Appeals' decision, this case "is not about a consensual relationship with a tribe or the tribe's ability to govern itself; it is all about the tribe's claimed power to govern non-Indians and nonmembers of the tribe just because they enter the tribe's territory." (App. at 24).

CONCLUSION

For the reasons outlined above, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to review the *en banc* judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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